IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1574

DANIEL A. DEKELAITA,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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June 9, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondent Shell Oil Company ("Shell") requests that this Court deny the Petition for Certiorari filed in this case because it does not present for review by this Court any important issue of law or conflict with any other Circuit Court of Appeals. This case merely involves a situation in which Petitioner totally failed to present sufficient proof at trial to make out a *prima facie* case, and therefore suffered a directed verdict by the district court, which made an extensive review of the entire rec-

ord in the light most favorable to Petitioner. The Ninth Circuit, after both parties filed briefs which extensively reviewed the factual record and discussed the relevant legal standards, unanimously ruled that the district court's view of the evidence was entirely correct and that the district court had applied the appropriate legal standards. Clearly, then, this case presents no issue worthy of the attention of this Court and the Petition for Certorari should be denied.

QUESTION PRESENTED

Whether the entry of a directed verdict by the district court on the basis of a total lack of evidentiary support for Petitioner's claims, and the affirmance of the directed verdict by the Court of Appeals, presents any substantial legal issue appropriate for resolution on writ of certiorari.

STATEMENT OF THE CASE

Petitioner's ("DeKelaita") Statement of the Case contains characterizations of the factual evidence which are misleading, inaccurate, and without support in the record. DeKelaita's statement of the facts in the court below was similarly defective, which explains why the Ninth Circuit opened its opinion with the following statement about DeKelaita's characterization of the trial evidence:

> Any resemblance between the case described in DeKelaita's brief and the case actually disclosed by the evidence presented by DeKelaita at the trial is miniscule. What is missing in the brief is the disclaimer that used to appear at the beginning of motion pictures, stating that any resemblance between characters in the picture and actual persons, living or dead, was purely coincidental. (Pet. Appendix A, i.)

This private antitrust action (15 U.S.C. § 15) was instituted on March 22, 1974, by DeKelaita against Shell for alleged violations of the Sherman and Clayton Acts (15 U.S.C. §§ 1, 2 and 14), arising out of alleged actions taken by Shell toward DeKelaita during a sixteen month period from December 8, 1971 to March 23, 1973, when he leased and operated a Shell-brand service station first for six months in Pacifica, California, and then for a year in Mountain View, California.[1]

In a complaint filed on March 22, 1974, DeKelaita charged that Shell violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, by (1) fixing his retail gasoline prices, (2) requiring him to purchase gasoline, tires, batteries and accessory products ("TBA") from Shell, and (3) attempting to monopolize the retail gasoline business by replacing lessee-dealers with company-operated stations. For more than a year after filing the complaint, DeKelaita engaged in a comprehensive discovery program, which included four sets of detailed interrogatories, extensive demands for documents and admissions, and the depositions of seven sales and executive personnel of Shell in California and Houston, Texas.

The initial trial date of November 18, 1974, as well as the next two trial dates, all were postponed at the request of DeKelaita to allow more time for additional discovery. Finally, some five months later, the case was set for trial on April 21, 1975. DeKelaita presented his case over the course of ten full trial days, during which eleven witnesses (including DeKelaita) gave testimony, and hundreds of documents were offered in evidence. At the close of DeKelaita's case, Shell moved for directed verdict on the grounds that DeKelaita had presented no

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[1] DeKelaita operated both stations for a brief period of time during March and April, 1972, until Shell found a new dealer for the Pacificia station. He commenced operation of the newly-constructed Mountain View service station on March 23, 1972.

evidence which would allow a jury to find either a statutory violation, damages or subject matter jurisdiction as to each of his three claims (Tr. 1767).[2] The district court requested written memoranda on the motion and heard full oral argument from the parties (Tr. 1767-1838). During the course of the oral argument, the district court specifically asked DeKelaita's counsel to cite any record proof which would support his three basic antitrust claims, but counsel was unable to do so (Tr. 1813-32). After consideration of the written and oral submissions, as well as the exhibits and daily trial transcripts (Tr. 1842), the district court granted Shell's motion for a directed verdict in an oral opinion on May 6, 1975 (Pet. Appendix B, Tr. 1841-53). Taking up each of the three antitrust claims in turn, the district court granted a directed verdict on each claim, citing DeKelaita's total failure of proof on the issues of liability, damages and interstate commerce jurisdiction (*Id.*).

On May 14, 1975, DeKelaita filed a motion for a new trial (R. 1013). After briefing and oral argument the district court denied the motion. Thereafter, DeKelaita appealed the directed verdict to the Ninth Circuit, where similar factual arguments were briefed extensively and then argued orally. On February 28, 1978, after its own consideration of the briefs, oral argument and the record on appeal, the Ninth Circuit unanimously affirmed the directed verdict (Pet. Appendix A). Thus, two courts have examined the record evidence carefully and found that DeKelaita totally failed to prove a *prima facie* case on the essential elements of his antitrust claims.

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[2] In this brief, Respondent will use the following abbreviations: Tr. = Transcript; Pet. = Petition for Writ of Certiorari; PX = Plaintiff's Trial Exhibit; DX = Defendant's Trial Exhibit; R = Record on Appeal.

REASONS FOR DENYING THE WRIT

After extensive discovery and a ten-day trial, DeKelaita was not able to present sufficient evidence to make out even a *prima facie* case on his antitrust claims. The district court, after fully reviewing the evidence in the light most favorable to DeKelaita, issued a directed verdict because of his total failure of proof, knowing that a directed verdict was proper if the plaintiff had not presented sufficient evidence to sustain a jury verdict. The Ninth Circuit upheld this verdict after extensive briefing and argument directed to the factual record in the case as well as the appropriate legal standards, citing *Chisholm Bros. Farm Equipment Co.* v. *International Harvester Co.*, 498 F.2d 1137, 1139-40 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

DeKelaita does not dispute the legal standard applied by the courts below, nor does he cite any evidence to demonstrate that a specific finding was in error. In essence, DeKelaita is asking this Court to make a *third* review of the lengthy trial record to search for facts which both the district court and the Ninth Circuit have been unable to find. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari. *United States* v. *Johnson*, 268 U.S. 220, 227 (1925); *Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). In situations where the district court does direct a verdict, this Court also has held that such a determination is entitled to great weight, especially when approved by the Court of Appeals. *Patton* v. *Texas Pacific Railway*, 179 U.S. 658 (1901).

Based upon the record, the district court had an affirmative duty to grant a directed verdict in order to prevent the case from going to the jury on the basis of mere guesswork and speculation. *Baltimore & Ohio Railroad* v. *Groeger*, 266 U.S. 521, 524 (1925); *Pennsyl-*

vania Railroad Co. v. *Chamberlain*, 288 U.S. 333, 343 (1933); *Brady* v. *Southern Railway*, 320 U.S. 476, 479-80 (1943).

The conclusion that no review by this Court is warranted is fortified by a brief review of the salient points of evidence in this case. This case involved nothing more than the proper conclusion by a federal appeals court that a district court correctly used its discretion to direct a verdict where DeKelaita failed to present a *prima facie* case. DeKelaita misconstrues the purpose of a *certiorari* petition when he devotes half of his Petition (Pet. 8-24) to merely reasserting and categorizing various factual allegations of "violations," which can only be characterized as fanciful conclusions, totally unsupported by the record.

Although DeKelaita claimed that Shell somehow fixed the retail price of his gasoline, the evidence showed unequivocally that Shell never told or required DeKelaita to charge any particular price (Tr. 1563-64), never pressured or threatened him regarding price (Tr. 187-90, 204-05, 555-56, 661, 672, 1287, 1546-64, 1600-02), and never even suggested a retail price to him during most of his tenure as a dealer (Tr. 1289). To the contrary, the evidence further showed that he frequently changed his prices to suit his own desires (Tr. 1249, 1286-87, 1291-92, 1297, 1565-69, 1575-76). Indeed, the exhibits indicate that on only 3 out of some 370 days were DeKelaita's prices at the Shell suggested retail levels on all three grades of gasoline (PX 446, 448; DX BC, BD). DeKelaita testified that he would decide on his own to lower his prices below the Shell suggested retail (Tr. 1253-58, 1291-93, 1311-12, 1548-64).

Similarly, although DeKelaita claimed that Shell tied the sale of Shell brand products to his station lease and required that he sell them exclusively, the evidence showed

that neither Shell's leases nor its product agreements required the purchase of any Shell products (PX 1-B, 1-C, 7, 8; Tr. 546-47, 708), that Shell's written policy statement on TBA expressly told DeKelaita that he could buy TBA from whomever he wished (DX C, O) and, more specifically, that he in fact did buy substantial quantities of TBA from suppliers other than Shell (Tr. 1452-55, 1729-30, 1474-75, 1687). Moreover, the evidence shows that DeKelaita bought Shell products because he desired to do so and not because he was forced or coerced to do so (Tr. 1302-09).

Also, although DeKelaita claimed that Shell was attempting to monopolize the Northern California retail gasoline market through company-operated stations, the evidence showed that Shell was only one of numerous marketers in the area (PX 126), that it had less than 20 percent of the market (*Id.*) which was served almost entirely by independently owned or leased stations, and that its company-operated stations were only a tiny percentage (less than 1) of all Shell stations (PX 34, 35). Furthermore, the district court found absolutely no evidence at all indicating a dangerous probability that Shell either could or would monopolize the relevant market (Tr. 1849-51).

Faced with a total failure of proof on each of his antitrust claims, DeKelaita now seeks to circumvent this shortcoming in his Petition by clothing this case in highly inaccurate garb. For example, he claims that the courts below somehow accepted "as a defense to a price fixing agreement that it was not coerced by one of the parties" (Pet. 27). But this description of the opinions below is a serious misstatement. Rather than accepting any such defense, the Ninth Circuit specifically ruled that the district court had found correctly that DeKelaita made no showing of *any* price-fixing agreement whatsoever, whether such agreement be claimed to arise voluntarily or through coercion.

Another illustration of DeKelaita's misstatement of the facts of the case in his Petition is his claim that the courts below found "an absolute defense to a Section 3 Clayton Act exclusive dealing case and a Section 1 Sherman Act tie-in case in merely providing written policy statements that a dealer is free to buy products from any source" (Pet. 29). But the courts below delivered no such ruling. Rather, the Ninth Circuit held that the district court properly had concluded that DeKelaita had failed to show that he was required to purchase Shell gasoline or TBA and, therefore, did not make out a claim of tying or exclusive dealing.

Also, DeKelaita's claims in his Petition regarding attempted monopolization are simply an effort to have this Court review the evidence which already has been found by the district court and the Ninth Circuit to be insufficient to establish even a *prima facie* case.

Finally, DeKelaita simply alleges in very general terms that one who is damaged because of an antitrust violation is entitled to recover (Pet. 36-37). What DeKelaita omits is his total failure to prove either (1) the existence of any antitrust violation, (2) its impact upon him, or (3) the fact that he was damaged. At trial, DeKelaita relied on an accountant, Stanley G. Weiner, as his sole witness to prove both the fact of injury and the measure of damages on the termination claim (Tr. 1166-67). Mr. Wiener's testimony at trial disclosed that (1) he was not an expert in business valuations, had never met DeKelaita, had never seen his service stations, and had not even looked at DeKelaita's books and records (Tr. 1193, 1201-04); (2) he had used various projected gallonage and rate of return figures supplied to him by DeKelaita's counsel 1408-09); (3) he had assumed for his valuations, without any factual basis (and contrary to fact), that a dealer could raise retail prices without any decline in volume

and, on this basis, he further assumed constant gallonages for a period of 25 years (Tr. 1207, 1396, 1409-11, 1415-16); and (4) he had no knowledge or experience about the proper rate of return for a service station (Tr. 1401-05, 1422).

The Ninth Circuit was correct in holding "[u]nder these circumstances, it would have been error to admit the proffered exhibits," citing *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 85-89 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

DeKelaita does not make *any* attempt before this Court to dispute the evidentiary ruling of the district court, affirmed by the Ninth Circuit, excluding his damage exhibits. Instead, he simply ignores the requirement that he prove damages with some minimal specificity, and cites no record evidence to show that his damage evidence was other than pure speculation.[3]

CONCLUSION

The district court properly directed a verdict against DeKelaita because of a total failure of proof, and DeKelaita has raised no issue worthy of review by this Court. Indeed, his Petition does not even give an accurate description of vital aspects of the case. As stated by the Ninth Circuit: "Any resemblance between the case described in DeKelaita's brief and the case actually disclosed by the evidence presented by DeKelaita at trial

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[3] In a similar vein, DeKelaita objects to the exclusion of the complaint and opinion in the Federal Trade Commission proceeding involving the so-called "sales commission method" of marketing TBA (Pet. 37). However, DeKelaita does not challenge the evidentiary ruling of the district court, which was affirmed by the Ninth Circuit, on any legal or evidentiary grounds. These materials are clearly irrelevant, relating to a method of marketing which existed in the 1950's and was discontinued by Shell many years before DeKelaita became a lessee-dealer.

is miniscule." At bottom, DeKelaita's essential desire is to have this tribunal provide yet another review of evidence which has twice been found wanting by experienced lower courts. No such review of evidence by this Court is warranted here. The Petition for Certiorari should be denied.

Respectfully submitted,

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